United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2161

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2161

RONSON CORPORATION,
Plaintiff-Appellant,

—against—

LIQUIFIN AKTIENGESELLSCHAFT,
Defendant-Appellee,

and

LIQUIGAS, S.p.A., LIQUIMPORTEX AKTIENGESELLSCHAFT, THE FIRST NATIONAL BANK OF WASHINGTON, RAFFAELE URSINI, PHILIP MARFUGGI, DANIEL A. PORCO and MICHELE SINDONA,
Defendants,

LOUIS V. ARONSON II, JEROME J. BLUMBERG, GILBERT MACKAY, MORTON A. SIEGLER, MORRILL J. COLE, JUSTIN P. WALDER, A. LESTER GRANET, ROBERT B. WRIGHT, and GEORGESON & CO.,
Counterclaim-Defendants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

Defendant-Appellee, Liquifin Aktiengesellschaft ("Liquifin") submits this Brief in opposition to the appeal by Ronson Corporation ("Ronson") from an order made by

the United States District Court (Hon. Charles H. Tenney, U.S.D.J.) on August 21, 1974 granting Liquifin's motion for an order preventing Ronson and the Inspectors John P. Mead and Lawrence Bloom ("the Inspectors") from publishing as the final report of the results of the Ronson annual shareholders' meeting an "Inspectors' Report" dated July 8, 1974 and compelling Ronson and the Inspectors to issue a final report which reflects Liquifin's instructions, made on July 5, 1974, that the shares of its nominee, Finbow & Co. ("Finbow") be voted so as to ensure the election of Oreste Marfuggi and Donald J. Zoeller, rather than James C. Malone and John R. Markley, to the Ronson Board of Directors.

Counterstatement of Issues Presented

1. In the course of a proxy litigation is an order giving certain temporary effect to one party's ballot until the validity of the election itself is resolved one from which an appeal may be taken?

2. Was the District Court correct in holding that a shareholder may correct his ballot after the polls have closed provided the results of the election have not been officially announced?

3. Did the District Court err in holding that the "ground rules" agreement between Ronson management and Liquifin did not preclude Liquifin's changing its ballot?

4. Is it unlawful for an attorney for a minority shareholder to serve as a director simply because that share-

holder and incumbent management are at odds and engaged in litigation over corporate control?

Statement of Facts

This appeal represents an attempt by Ronson's incumbent management to misconstrue technical rules for the sole purpose of preventing Liquifin, Ronson's largest shareholder, from being represented on the Ronson board by the persons of its choice. The lawsuit itself is one of a series of actions instituted by the management of Ronson in opposing a bid by Liquifin, now beneficial owner of 36.4% of Ronson's outstanding common stock (which stock was acquired by means of a tender offer), to ultimately obtain control of Ronson. (268a).*

The action, commenced by Ronson's management on June 7, 1974, seeks to enjoin and otherwise set aside Liquifin's use of proxies solicited during a proxy contest for control of Ronson. In its complaint Ronson alleges that Liquifin's acquisition of Ronson common stock and its attempt to gain control has exposed Ronson to injury (7a), that Liquifin made purchases of Ronson common stock within 90 days prior to the tender offer (26a), and that Liquifin's solicitation of proxies violated the securities laws and regulations. (16a). Liquifin has counterclaimed for injunctive relief as well as damages, alleging that Ronson management has violated the federal securities laws and regulations in soliciting proxies on their behalf. (48a-65a).

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* Numbers in parentheses followed by "a" refer to pages of the Joint Appendix.

On June 12, 1974 a hearing was held before The Honorable Charles H. Tenney, U.S.D.J. (81a). In order to avoid the costly rescheduling of the election set for June 13, 1974, it was agreed that the determination of the applications for preliminary injunctive relief be deferred to allow the election to take place as scheduled. (207a). The disputed validity of the election would, therefore, be determined at a later date.

At the hearing it was agreed that counsel for Ronson and Liquifin would enter into an Agreement and Presumptions for conducting the annual meeting including the election ("the ground rules") which was done on June 13, 1974. (81a). At this hearing Judge Tenney made it clear that he was prepared to resolve any disputes regarding the ground rules for the upcoming election. (Trans. of June 12, at 9-10).

The election proceeded as scheduled. After the election, a dispute arose as to how Liquifin's proxies were to be counted. At stake were two of Ronson's nine directorships.

On June 20, 1974, pursuant to the ground rules, an "unofficial" tally of the ballots cast was made and reported to both sides showing that all of Ronson's seven nominees had received sufficient votes to be elected and that two of Liquifin's nine nominees (Messrs. Markley and Malone) had received 138 more votes than the remaining seven Liquifin nominees. (150a). This was the result of votes cast by two Ronson shareholders (Mr. and Mrs. Collins B. Hamblen of Mesa, Arizona) who had split their votes between management's nomineees and Liquifin's. (268a).

On July 5, 1974, prior to a meeting with the Inspectors scheduled for July 8, 1974 at which the Inspectors were to

issue to both parties a tentative report as to the result of the election after challenges were made and ruled on, Liquifin notified the Inspectors in writing that its ballot should be read as casting sufficient votes to ensure the election of two of its other nominees (Messrs. Marfuggi and Zoeller) to the remaining two vacancies. (83a, 107a, 108a). Ronson management objected and the Inspectors issued their "Inspector's Report" on July 8, 1974, showing election of the seven Ronson nominees and Messrs. Markley and Malone. (268a-269a).

As a result of this dispute arising out of the election, the parties returned before Judge Tenney on July 9, 1974, on Liquifin's motion to compel the Inspectors to count Liquifin's ballots as it had directed and to prevent publication of the July 8, 1974 Inspector's Report showing the election of Messrs. Markley and Malone as a final, official election report and to direct the Inspectors to issue a corrected Final Report and Certificate as to Results of Election which would reflect the election of Messrs. Marfuggi and Zoeller.

It was pointed out to Judge Tenney on July 9, 1974 that the entire proxy contest had been conducted on the basis of assurances by Ronson management to its shareholders, given in its proxy solicitation letter of May 31, 1974, that Ronson management was deliberately leaving two seats to be filled by directors *of Liquifin's choice.* In this letter, Ronson management stated (307a):

> ". . . we leave to Liquifin its decision to vote its shares for these two seats on the Board."

This very same position—now attempted to be evaded in the Ronson Brief (See Ronson Brief at 9)—was taken by

Ronson's counsel before Judge Tenney at the July 9, 1974 Hearing, when he said (286a-287a):

> "We [Ronson] left two seats open so that they [Liquifin] could name two directors. In other words, we have a nine-man board. We only nominated seven, and we anticipated that they would do whatever was necessary to elect two directors. They had what I call a clean shot."

On July 9, 1974, Mr. Markley in a telegram and Mr. Malone in a letter each expressed their desire to defer in favor of Messrs. Oreste Marfuggi and Donald J. Zoeller with respect to membership on the Ronson Board (See Appendix I and Appendix II attached), and Judge Tenney was so advised. (289a).

On July 9, 1974, Judge Tenney denied Liquifin's request to enjoin the issuance of the July 8, 1974 Inspector's Report as a final report as to the seven Ronson nominees. (291a, 300a, 303a, 304a). That ruling is not part of this appeal. As to the two Liquifin representatives only, Judge Tenney rejected Ronson's arguments and, by the Order of August 21, 1974 now appealed from, Judge Tenney ordered that the Messrs. Marfuggi and Zoeller be reported as winning the two remaining directorships. (206a).

On September 6, 1974, the Inspectors of Election issued their Final Report and Certificate as to Results of Election, showing the election of the seven Ronson nominees and Messrs. Marfuggi and Zoeller (see Appendix III attached).

Summary of Argument

This Court lacks jurisdiction over this appeal, since the order of the District Court is neither an injunction nor a final order from which an appeal may be taken.

Even assuming that the order herein is appealable, it is only fair and equitable that Liquifin, the largest single shareholder in Ronson with 36.4% of the shares, should be entitled to be represented on the board of directors with at least two of nine directors *of its own choice.* Indeed, the Ronson shareholders have been told that this is what would take place. Their proxies were solicited by both sides on the basis of a statement publicly made by Ronson to the shareholders in management's proxy solicitation materials. Shareholders will have been deceived if such a result cannot now be effectuated.

As the District Court determined, the law provides that a bollot may be corrected or changed to effectuate the true intent of the one executing the ballot at any time until the actual election of directors has been formally completed. Before the Inspectors issued their Report of July 8, 1974 on their count of the ballots, and well before the official announcement of the results of the election, Liquifin had officially informed the Inspectors as to its true intent to be represented on the Ronson board of directors by Messrs. Marfuggi and Zoeller.

No injury results to Ronson by permitting Liquifin to exercise its selection, since, as the District Court noted (214a), Ronson's present management will retain control over the board of directors. Nor will any of the candidates be injured, since the two persons who are listed in the Inspectors' Report as having received the 138 additional

votes have stated in writing that they would prefer to withdraw in favor of the persons designated by Liquifin. The only effect of permitting Liquifin to exercise its selection is to prevent a single holding of 138 shares, whose ballot is basically in favor of management, from controlling the result and having the will of that single holding supersede that of the largest single shareholder and of the many stockholders who have supported that shareholder, regarding the persons who shall represent the largest shareholder on the Ronson Board for the ensuing year.*

ARGUMENT

POINT I

This Court Lacks Jurisdiction to Entertain Plaintiff's Appeal.

A. *The Order Is Not An Injunction*

One of the issues in this litigation, involving claims by both sides that each other's proxy solicitations contained false and misleading statements, is the validity of the election of the directors of Ronson. The order from which Ronson appeals concerns how to give effect to the ballots cast in this election only until the validity of the election itself is resolved.

While an order which is an injunction is appealable under 28 U.S.C. § 1292(a)(1), clearly not every order,

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* Liquifin also contends that the Hamblen ballot is invalid because the Hamblens voted for a person who was not running for election, and there is no way of determining how they would have voted if this mistake had not been made. Ronson management had mistakenly included on their ballot the name of a person who in fact was not a nominee for the board of directors. (281a-282a, 289a, 304a).

whether "mandatory" or not, can be defined as an injunction. As a general rule, "an order incidental to a pending action that does not grant part or all of the ultimate injunctive relief sought is not an injunction." 9 J. Moore, *Federal Practice* ¶110.20(1), at 233 (2d ed. 1973).*

While Liquifin's motion requested an injunction against issuance of the Inspectors' Report of July 8, 1974 as a final report, this aspect of the motion was denied by Judge Tenney on July 9, 1974, and Ronson's present appeal does not deal with this denial. The August 21, 1974 Order of Judge Tenney, which alone is involved in the present appeal, deals solely with an interlocutory matter, i.e., the issuance of a Final Report and Certificate as to the Results of Election relating to the election of Messrs. Marfuggi and Zoeller to represent Liquifin on the Ronson Board. That order has no effect upon the final relief sought in this case.

The basic allegations, which contest the validity of the election itself, are still to be resolved. Judge Tenney's order has the effect of merely keeping order until the validity of the election is settled. Thus, the order from which Ronson now seeks to appeal is not an injunction from which an appeal may be taken.

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* There are exceptions to this general proposition: (1) The *Enelow-Ettelson* rule, which concerns the distinction between actions at law and in equity. *See, Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379 (1935). (2) Orders that attempt to prevent the commencing of prosecution of actions in other courts. *See, e.g., Maryland* v. *Atlantic Aviation Corp.*, 361 F.2d 873 (3d Cir.), *cert. denied*, 385 U.S. 931 (1966). None of these exceptions are applicable here. Similarly, the case of *Belknap* v. *Leary*, 427 F.2d 496 (2d Cir. 1970), where what on its face appeared to be a temporary restraining order was held to be in reality a mandatory injunction because the order was to have a final, immediate effect which was not incidental to any pending action, and thus appealable is not applicable to the present case.

B. *The Order Is Not Final Under 28 U.S.C. § 1291*

The only other possible argument for allowing an appeal would be an assertion that Judge Tenney's order is "final" within the meaning of 28 U.S.C. § 1291. While recognizing that the requirement of finality is to be given a "practical rather than a technical construction", *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the fact remains that Judge Tenney's order in this case clearly is not final and is therefore not appealable.

The *Cohen* decision is the basis for what became known as the *Cohen* rule. An order is appealable under the *Cohen* rule only if three requirements are fulfilled:

> (a) The appealed order "must fall in that small class which finally determines claims of right separable from and collateral to" the main action. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. at 546.
>
> (b) The order must present a question of such *public* importance that it is "too important to be denied review". *Id.; Donlan Industries, Inc.* v. *Forte*, 402 F.2d 935, 937 (2d Cir. 1968). *See* 9 J. Moore, *Federal Practice*, ¶110.10, at 133-34 (2d ed. 1973).
>
> (c) It must also concern rights which, if not immediately reviewed, "will have been lost, probably irreparably." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. at 546; *accord, United States* v. *Nixon*, 42 U.S.L.W. 5237, 5240 (U.S., Jul. 24, 1974); *United States* v. *Ryan*, 402 U.S. 530, 533 (1971).

Ronson is unable to fulfill these requirements.

First, Judge Tenney's order dealing with the effect to be given the ballots in the election is, in the words of *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094, 1100 (2d Cir. 1974), "inextricably intertwined with the ultimate re-

lief sought", i.e., the validity of the election itself. A decision on the merits could alter the composition of the entire Board of Directors, thereby rendering Judge Tenney's order moot. Judge Tenney's order, in other words, is merely a housekeeping device to be in effect only until the validity of the election itself is finally determined.

Second, it cannot be seriously contended that this order presents a question of such public importance that it is too important to deny review. As pointed out in Point II, *infra*, the established law supports Judge Tenney's order, and the order is not one which is apt to have any effect on the public at large or even the shareholders of Ronson, since it involves only two of nine seats on the board of directors.

Third, Ronson's present management will not irreparably lose its rights since it will obviously retain control over the company. In fact, Ronson's argument that it will be irreparably injured by Liquifin's being represented on the Board by its counsel, Mr. Zoeller, is without substance for a number of reasons. Ronson's contention denies Liquifin, the largest shareholder of Ronson, the right to be represented by a director of its own choice. Moreover, Mr. Zoeller, as an attorney for Liquifin should no more be denied a seat on the Board than Mr. Louis V. Aronson II, who has with a great deal of vigor personally led management's fight to keep control of Ronson from Liquifin. Finally, Ronson's argument assumes that Messrs. Marfuggi and Zoeller, as directors of Ronson owing a fiduciary duty to all Ronson shareholders will somehow breach this duty by favoring Liquifin. There is no reason to assume the largest shareholder of Ronson will want to harm the corporation and diminish the value of its investment. For a further discussion of this contention see Point VI, *infra*.

POINT II

It Is Well-Settled Law That a Shareholder May Clarify, Correct, or Even Change, His Ballot After the Polls Have Closed and Before the Final Results Are Officially Announced.

In their definitive treatise *Proxy Contests for Corporate Control* (2d ed. 1968), E. Aranow and H. Einhorn unequivocally state:

> "Not only may the inspectors delay closing the polls or even reopen them for the receipt of ballots, but it has been held that inspectors *must* accept ballots tendered to them after the polls have been closed, but before the final result has been announced.
>
> * * * * *
>
> "A stockholder has the right to change his vote at any time before the final result is announced and until that time he should be permitted to correct his ballot." (*Id.* at 367, 370)

An enunciation of the same principle is found in 5 W. Fletcher, *Cyclopedia of The Law of Private Corporations* § 2017, at 104 (perm. ed. rev. 1967):

> "A stockholder or member may change his vote at any time before the result is finally announced, and before that time it is proper to permit him to correct his ballot so that it will express his true intention." (Footnote omitted.)

The principle is reiterated in 19 *C.J.S. Corporations* § 720 (1940), which states:

> "[A] vote, although actually cast, does not become final until the result of the voting has been announced, until which time any vote may be changed at the will of the voter." *Id.* at 46.

This equitable rule was recently followed by the Supreme Court of Washington in *Washington State Labor Council* v. *Federated American Insurance Co.*, 78 Wash. 2d 263, 474 P.2d 98, 103 (1970) (en banc), which, recognizing the importance of the shareholder's voting rights, allowed ballots to be submitted at any time prior to an announcement of the election results. In that case, opposition shareholders brought an action challenging the validity of the voting procedures followed in a proxy contest, arguing that the management's votes were untimely and invalid. The trial court found as a matter of fact that the polls were not actually closed when the company's ballots were cast. On appeal, the trial court's findings were affirmed, but the Supreme Court did not limit its holding to the technical issue as to when the polls closed. The court's language is broad and persuasive:

> "The principle emerging from the cited authorities is that a shareholder, who through inadvertence, mistake, or other reasonable cause is unable to vote or is prevented from casting his vote or his proxy votes during the regular time of balloting, *will not be precluded from voting after the balloting has closed and before the final results are officially announced;* provided, such belated voting is not prohibited by statute, corporate bylaw, or other officially authorized and announced rules and is free of fraud, bad faith and/or overreaching." 474 P.2d at 103-04. (Emphasis added.)

The Washington court relied, in part, upon its earlier decision in *State ex rel. David* v. *Dailey*, 23 Wash. 2d 25,

158 P.2d 330 (1945). In that case, the deciding votes were cast only after the director involved was informally told by an election teller that he was "low man" on the ticket and was not elected. The regular time for balloting had ceased and tabulation of the election results had commenced. Since the final result had not been formally announced, the court permitted the votes to be counted.

In *Young* v. *Jebbett,* 213 App. Div. 774, 779, 211 N.Y.S. 61, 66 (4th Dep't 1925), the court accepted proxies which were formally offered twenty-four hours after the polls were closed. The court stressed that the crucial time is the formal announcement of the election results: "Although the polls had closed, the meeting was still in existence, awaiting the report of the judges." 213 App. Div. at 779, 211 N.Y.S. at 66. *Accord, Wells* v. *Beekman Terrace, Inc.,* 23 Misc.2d 22, 197 N.Y.S.2d 79 (Sup. Ct. N.Y. Co. 1960) (Shareholder permitted to change vote following preliminary announcement of the results made before the meeting was recessed to an adjourned date); *State ex rel. Dunbar* v. *Hohmann,* 248 S.W.2d 49 (Mo. App. Ct. 1952) (Shareholder allowed to cast ballot at 12:29 P.M. despite advance announcement of closing of polls at 12:00 noon).

Underlying the rule permitting post-election correction of ballots is a judicial recognition that shareholders should be given every fair opportunity to express their intentions.

In *Zierath Combination Drill Co.* v. *Croake,* 21 Cal. App. 222, 131 P. 335 (Dist. Ct. App. 1913), a faction of stockholders delivered their ballots to the election tellers without having cumulated their votes. One of the tellers informed the shareholders of their mistake and permitted them to correct their ballots by cumulating their votes. The court held that such procedure was proper since it

provided for expression of the true intention of the stockholders, and such intention was discovered before the result of the election was announced. The court stressed that corporate elections, unlike political elections, are business affairs where all stockholders should have "the fullest liberty in expressing their wishes, disregarding technical matters which enter into general [political] elections controlled and restricted by special statutes." 131 P. at 335. *Accord, Zachary* v. *Milin,* 294 Mich. 622, 293 N.W. 770 (1940) (Stockholder permitted to change his ballot after learning that cumulative voting was in effect); 5 W. Fletcher, *Cyclopedia of The Law of Private Corporations* § 2017, at 104 (perm. ed. rev. 1967) (shareholder intent controls).

Based on the overwhelming authority favoring the correction or change of ballots to express a shareholder's true intent prior to announcement of the final results, the District Court exercised its discretion to direct that the Inspectors' Final Report and Certificate reflect the true intentions of Ronson's major shareholder. As expressed by the court in *Young* v. *Jebbett,* 213 App. Div. 774, 779, 211 N.Y.S. 61, 66 (4th Dep't 1925), "The fundamental rule is that all who are entitled to take part [in a corporate election] shall be treated with fairness and good faith." Under New Jersey law, the inspectors of election are under a statutory duty to "do such acts as are proper to conduct the election or vote with fairness to all shareholders." New Jersey Business Corporation Act, N.J.S.A. § 14A:5-26 (1969).

The right of a shareholder to vote his true intent is a right of primary importance and is to be fully protected by a court of equity. As the court in *Washington State*

Labor Council v. *Federated American Insurance Co.*, 78 Wash. 2d 263, 474 P.2d 98 (1970), stated:

> "The right of a qualified shareholder in a corporation to vote, either personally or by proxy, for the directors who are to manage the corporate affairs is a valuable and vested property right. It is one of the most important rights incident to stock ownership and should not be annulled for purely technical reasons." 474 P.2d at 103.

POINT III

Ronson's Reliance on the Inspectors' Rulings and the July 8, 1974 "Inspectors' Report" as Final and Binding on This Court Is Misplaced.

In Point I of its Brief, Ronson argues that under New Jersey law, Inspectors of Election perform more than mere ministerial functions and have complete discretion in determining all matters in connection with voting. On pages 12-13 of its Brief, Ronson emphasizes that under the New Jersey Business Corporation Act, N.J.S.A. § 14A: 5-26) Inspectors determine "the validity and effect of proxies, . . ." and "hear and determine challenges and questions arising in connection with the right to vote . . .".

This section obviously places upon the Inspectors a legal duty to determine questions concerning voting and to determine them within the framework of the governing legal principles.* Nowhere does this section purport to give

* Thus, the cases cited by Ronson at pages 13 to 14 of its Brief to the effect that the Inspectors have certain discretion which will not be overturned unless abused, are inapposite. The cases and authorities we have cited show that it is an abuse of discretion for an inspector not to permit clarification of a ballot or proxy prior to official announcement of the result of a corporate election.

Inspectors a final, unreviewable discretion to act contrary to law. In fact, it charges the Inspectors with a legal duty beyond the mere counting and tabulating of votes. The central theme of the statute (a provision not emphasized by Ronson in its quotation) is that Inspectors must

> "do such acts as is proper to conduct the election or vote with *fairness* to all shareholders." N.J.S.A. § 14A:5-26 (1969) (Emphasis added.)

Moreover, the statute does not give the Inspectors' determination pursuant to that duty conclusive effect. Rather, the statute itself expressly states that any report shall merely be "*prima facie* evidence of the facts therein stated." *Prima facie* evidence, of course, invites rebuttal.

Indeed, paragraph 2 of the ground rules agreement of June 13, 1974 governing the conduct of the Ronson annual meeting expressly makes any determination of the Inspectors "rebuttable by proper evidence . . . before any appropriate tribunal or forum" (87a), and reserves the "right of either party to rebut any such Presumptions or to challenge the application of the Presumptions by the Inspectors to any proxy or ballot or to contest such application or decision of the Inspectors with respect thereto before any appropriate tribunal or forum" (87a). Paragraph 15 makes the entire agreement subject to "New Jersey law without giving effect to New Jersey conflicts of law principles" (92a).

Pursuant to the applicable law and the ground rules agreement, Liquifin presented to the District Court its true intention which was incorrectly reported in the first instance by the Inspectors of Election, and which the Inspectors had refused to act upon under a mistaken notion

that they could not allow a correction or clarification of the ballot voting the Finbow stock after the closing of the polls. The District Court acted correctly in requiring the Inspectors to effectuate Liquifin's intention.

The Inspectors have now filed a proper Final Report and Certificate as to Results of Election, and Ronson should now be required to announce that Certificate and the results certified therein at a resumed Annual Meeting session.

POINT IV

The Ground Rules Agreement Does Not Preclude Liquifin's Clarification of Its Ballot.

Ronson's argument that the ground rules agreement bars Liquifin from clarifying its ballot ignores the true state of the law and of the facts. As we have shown, the basic premise of the law governing this appeal is that the Inspectors, as a matter of fairness, must allow a shareholder to express his intent with respect to his ballot at any time before the final confirmation of the election at the meeting, *regardless of whether such intent is expressed before or after the closing of the polls.* Since this principle is established by the courts as a rule of "fairness", it follows that any waiver of this rule by the ground rules must be by clear and explicit language. As the District Court held, no such language is found in the ground rules.

The two paragraphs of the ground rules relied upon by Ronson, paragraphs 5 and 6, do not even refer to, much less prohibit, what Liquifin is seeking before this Court. The correct interpretation of paragraphs 5 and 6 was made by the District Court (211a-212a):

"Paragraph 5, after providing that the polls shall be closed at 4:00 P.M. on June 13, 1974, states that 'thereafter no further voting shall be permitted and no further proxies or ballots shall be accepted or considered by the Inspectors . . .' Paragraph 6 states that 'Prior to the closing of the polls, proxies, ballots and evidence must be delivered to the Inspectors at the Ronson Annual Meeting. . . .' Ronson argues that these paragraphs not only prohibit the filing of additional ballots and proxies after the polls have been closed, but also preclude a shareholder from changing his ballot in any manner once the polls are closed. The Court believes that Ronson's is a rather strained interpretation of the Agreement. The phrase in paragraph 5—'further voting'—merely suggests that the filing of *additional* ballots is prohibited, *Webster's Third New International Dictionary* 924 (1964)—a situation not present here. Paragraph 6 merely provides that *physical* delivery of all proxies and ballots must be made before the polls have closed; Liquifin has complied in that respect. After having examined the Agreement in its entirety, the Court is convinced that the parties to the Agreement never anticipated the possibility that, after the polls had been closed, a shareholder might wish to change a timely offered ballot. Inasmuch as the Agreement is silent on this matter, the Inspectors' decision not to honor Liquifin's July 5th instructions is not binding. (Agreement ¶2)."

From the foregoing, it is clear that the ground rules agreement does not prevent Liquifin and Finbow from effectuating their intent with regard to the voting of the Finbow proxies as they are attempting to do in the present case.

Ronson's contention (see Ronson's Brief at 13-19) that Judge Tenney's order taken to its logical extreme would

result in the election becoming a "corporate melee" because the final announcement of the results of the election would be delayed indefinitely, is fallacious. Aside from the fact that Liquifin objected to the form of its ballot prior to the issuance of any report by the Inspectors, while Ronson never claimed that it wanted to change its vote to counter this objection,* the courts are certainly able to distinguish between legitimate requests to make a ballot conform with a voter's true intent and obstructionist objections which Ronson now argues might be forthcoming in other situations.

POINT V

The District Court Correctly Ruled That Messrs. Malone and Markley Were Unavailable and That There Was No Violation of the Proxy Rules; Moreover, Availability of Messrs. Malone and Markley Is Irrelevant.

Ronson's contention (see Ronson's Brief at 19-21) that Messrs. Malone and Markley were not "unavailable" and that Liquifin's claim of their unavailability is a violation of the proxy rules are both without merit and, moreover, irrelevant. Aside from the District Court's well reasoned holding that the proxy rules were not violated by Liquifin, the issue of the unavailability or availability of Messrs. Malone and Markley is simply not the point.

The point is that Liquifin took the steps necessary to have its ballot corrected to reflect the election of Messrs. Marfuggi and Zoeller who are its primary choices as di-

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* On July 9, 1974, Judge Tenney permitted the announcement of the vote for the seven Ronson nominees at Ronson's insistence that this be done, over Liquifin's objection; Ronson did not then indicate that it or any shareholder wanted to change any vote cast.

rectors. The District Court granted this request, and whether Messrs. Malone and Markley are "available" or not is irrelevant. They were not elected to sit. Messrs. Marfuggi and Zoeller were.

POINT VI

There Is No Conflict of Interest in Having Mr. Zoeller as a Member of the Ronson Board.

Ronson, in Point III of its brief, argues that it would somehow be immoral and unethical for Mr. Zoeller, one of Liquifin's attorneys, to be a member of the Ronson board of directors at a time when Liquifin and Ronson are engaged in litigation. Aside from the fact that this particular objection was not made below and thus not a ground for an appeal, this objection is clearly without merit.

To begin with Ronson's entire attack in terms of conflict of interest misconstrues the nature of the pending litigation. The underlying basis for Ronson's claim of conflict of interest lies in its repeated statements that Liquifin's counterclaim is against Ronson Corporation as well as its directors (see Ronson Brief at 4, 22-23). An examination of Liquifin's counterclaim shows that while Ronson is named as a nominal party in the counterclaim, the violations alleged and the relief demanded relate basically to the directors and officers individually, reflecting Liquifin's belief that Ronson's shareholders have been injured. Fundamentally, therefore, the Ronson claim of conflict of interest between Mr. Zoeller and Ronson Corporation simply is not true. The conflict of interest law does not provide a reason why Mr. Zoeller cannot represent Liquifin in litigation directed

in substance against the directors and officers of Ronson individually.

The short answer to Ronson's claim of conflict of interest is that Liquifin, which has a substantial investment in Ronson as its largest stockholder, is necessarily interested in bettering Ronson's performance and in acting in Ronson's best interests. The fact that Ronson's management and Liquifin are engaged in litigation, all of which has arisen out of Liquifin's attempt to gain control of Ronson, means only that Liquifin has different ideas on how to better run Ronson than does Ronson's current management. This certainly does not mean that either Liquifin or Mr. Zoeller have any intention of acting in a manner detrimental to Ronson (which would, of course, be detrimental to Liquifin as well).

Furthermore, under the rationale of Ronson's argument, a director of a corporation may never engage as a party or an attorney in a proxy battle or in any other kind of litigation with the corporation (including a director's derivative action) without first resigning his directorship. Obviously this is absurd, and is not required by any principle of corporate law or legal ethics.

The fact of the matter is that Mr. Zoeller, as a Ronson director, would owe a fiduciary duty to Ronson, and it may not be presumed in advance that he will breach this duty; if anything, the presumption is the opposite—that he will comply with his legal obligations.

In addition, these belated allegations now made by Ronson are a pure afterthought—they stand in stark contrast to the position Ronson took before its own stockholders and before the District Court. At the July 9, 1974 hearing before Judge Tenney, Ronson's counsel stated:

"We [Ronson] left two seats open so that they [Liquifin] could name two directors. In other words, we have a nine-man board. We only nominated seven, and we anticipated that they would do whatever was necessary to elect two directors. They had what I call a clean shot." (286a-287a)

* * * * *

"So what we did was we said people who own 36 percent of the stock are entitled to some representation on the Board of Directors. To that end, we are only going to nominate seven people. And then it was easily in their power to nominate two people, see, to do something, the result of which would have been that they elected the other two directors." (287a).

* * * * *

"The ground rules do not take care of a situation like this because I thought they were going to act in a perfectly rational and intelligent way. All that that required was that the two men that they want on the board would have been given more votes than the rest of their candidates, but they did not do that." (295a).

Ronson's position in Court on July 9, 1974 was merely a reaffirmance of the position it had taken at the very start of the proxy contest when, in its May 31, 1974 proxy solicitation letter, it had stated:

"* * * we leave to Liquifin its decision to vote its shares for these two seats on the Board."

Thus, Ronson's representation to the District Court, reflecting the entire basis on which the proxy contest was conducted, was that it made no difference to Ronson which of the Liquifin nominees, which included Messrs. Oreste Marfuggi and Donald J. Zoeller from the very beginning, were elected to the two seats on the Ronson Board.

This position of indifference as to which two of the nine Liquifin candidates were elected to the Ronson board was reiterated at the stockholders meeting, where Ronson's president stated "it's for the stockholders, to decide whether two of [Liquifin's] nominees may serve on the Ronson Board." (123a). In addition, Ronson's counsel stated at the meeting that Ronson expected "that the two highest Liquifin/Liquigas nominees will occupy the two seats." (123a).

At the time when all of these representations were made by Ronson to its shareholders and to the Court below, Ronson knew that Mr. Zoeller was one of Liquifin's nominees for a Ronson directorship. Ronson also knew, of course, that Mr. Zoeller was one of Liquifin's attorneys and that Liquifin and Ronson were engaged in litigation. If Ronson really thought that under these circumstances there was a problem with Mr. Zoeller's sitting on its board of directors, then Ronson had a duty under the Federal Securities Laws to inform its shareholders of this fact. In its multiparagraph complaint in the present action, Ronson alleged every conceivable ground for claiming that Liquifin's actions would be injurious to Ronson. (4a). There is no allegation in the complaint, however, regarding the possible unfitness of any of the individual Liquifin nominees to serve as Ronson directors.*

Actually, as we have shown, there is no conflict of interest, and Ronson's allegations in this regard are completely baseless. They represent merely a very belated afterthought

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* Ronson's suggestion (Ronson Brief at 29) that to allow Liquifin to correct its ballot results in a violation of due process to the shareholders who had no notice of Liquifin's application is misplaced. These shareholders, including the Hamblens, have not lost their right to vote their shares nor have their ballots been changed.

and an attempt to deprive Liquifin of effective representation on the Ronson Board.

POINT VII

Equity Requires Affirmance of the Order of the District Court.

The District Court correctly evaluated the equities in the present case as follows:

> "Management will not be prejudiced if Liquifin obtains the relief which it requests: it has succeeded in obtaining the election of its entire slate and its seven-man majority will remain undisturbed. The only dispute here is which two of the nine gentlemen nominated by Liquifin will sit in seats for which Management declined to nominate its own candidates. Although the Court does not believe that Ronson ever promised Liquifin that it could select the individuals for those seats, it also does not believe that Liquifin should be deprived of the opportunity to cast its votes as it sees fit by a party which has knowingly forfeited its right to nominate its own candidates for those seats. The only Ronson stockholders who could conceivably be prejudiced by the substitution of Marfuggi and Zoeller for Malone and Markley—the Hamblens—have not raised any objection. Moreover, it is difficult to understand why stockholders with 138 shares of stock should be able to override the choice of a stockholder with 1,559,776 shares even though the stockholder with the larger holdings attempted to change its vote before the results of the election were officially announced." (214a-215a)

It is thus clear that the equities require allowing Liquifin to clarify its ballot so as to reflect its choice regarding the election of its nominees to the Ronson board of directors.

CONCLUSION

For the foregoing reasons the appeal should be dismissed, or, in the alternative, the order of the District Court should be affirmed in all respects.

Respectfully submitted,

MUDGE ROSE GUTHRIE & ALEXANDER
Attorneys for Defendant-Appellee
Liquifin Aktiengesellschaft
20 Broad Street
New York, New York 10005
(212) 422-6767

Of Counsel:

MILTON BLACK
P. J. WILKER
JOHN B. SHERMAN
DOUGLAS J. DANZIG

Dated: September 27, 1974

APPENDICES

Appendix I

YSB252(1551)(2-029452E190)PD 07/09/74 1550
ICS IPMMTZZ CSP
2150S24000 TDMT HATBORO PA 102 07-09 0350P EDT
PMS DONALD ZOELLER, MUDGE ROSE GUTHRIE AND ALEXANDER, DLR
20 BROAD ST
NEW YORK NY 10005
I UNDERSTAND THAT, IN THE LIQUIFIN-RONSON PROXY CONTEST IN WHICH I WAS A CANTIDATE AMONG THE NEW DIRECTORS FOR RONSON, AND INDIVIDUAL SHAREHOLDER VOTED 138 MORE SHARES FOR ME THAN WAS VOTED FOR THE OTHER LIQUIFIN CANTIDATES. I WAS INTERESTED PRIMARILY TO SERVE AS PART OF A BOARD IN CONTROL OF RONSON. IN LIGHT OF WHAT HAS TRANSPIRED, I NOW DEFER IN FAVOR OF MESSRS DONALD J. ZOELLER AND OR ORESTE MARSUGGI. FOR THAT PURPOSE AND SUBJECT TO THE ABILITY OF MESSRS ZOLLER AND MARSUGGI TO BE NAMED AS DIRECTORS REPRESENTING LIQUIFIN'S INTEREST I NOW DECLARE MYSELF UNAVAILABLE TO BE ELECTED.

JOHN R. MARKLEY
NNNN

Appendix II

July 9, 1974

Mudge, Rose, Guthrie & Alexander, Esqs.
20 Broad Street
New York, New York 10005

Attention of Donald J. Zoeller, Esq.

Gentlemen:

I understand that in the Liquifin-Ronson proxy contest in which I was a candidate among the new Directors for Ronson, an individual shareholder voted 138 more shares for me than was voted for the other Liquifin candidates. I was interested primarily in serving as a part of a Board in control of Ronson.

In light of what has transpired, I now defer in favor of Messrs. Donald J. Zoeller and Oreste Marfuggi for that purpose, and subject to the availability of Messrs. Zoeller and Marfuggi to be named as Directors representing Liquifin's interest, I now declare myself unavailable to be elected.

Very truly yours,

James C. Malone

James C. Malone

JCM:mk

Appendix III

C T CORPORATION SYSTEM

Associated with The Corporation Trust Company
277 PARK AVENUE NEW YORK, N.Y. 10017 • (212) 826-16

September 6, 197

Mr. Milton Black
Mudge, Rose, Guthrie & Alexander
20 Broad Street
New York, New York 10005

Dear Mr. Black:

Enclosed please find the Final Report of voting at the 1974 Annual Meeting of Ronson Corporation.

This report is filed by the Inspectors of Election pursuant to the Memorandum Opinion and Order of United States District Judge Charles H. Tenney filed August 21, 1974 and supercedes the Report filed July 8, 1974 a copy of which is attached.

JOHN P. MEAD,
Inspector

LAWRENCE BLOOM,
Inspector

Appendix III

RONSON CORPORATION

ANNUAL MEETING OF STOCKHOLDERS JUNE 13, 1974

INSPECTORS' FINAL REPORT AND CERTIFICATE AS

TO RESULTS OF ELECTION

We, the Subscribers, the Inspectors appointed by the Presiding Officer at the Meeting of the Company commenced the 13th day of June 1974, and thereafter adjourned, do make this Final Report and Certificate as to Results of Election supplementing the Inspectors' Report submitted July 8, 1974, pursuant to the Memorandum Opinion and Order of United States District Judge Charles H. Tenney filed August 21, 1974, in an Action entitled "Ronson Corporation, Plaintiff, against Liquifin Aktiengesellschaft, et. al., Defendants, USDC, SDNY, 74 Civil 2488 (C. H. T.".

We report that, having taken the oath impartially to conduct the voting we did receive the votes of shareholders by proxy and by ballot, and we now report that the following were the number of votes of shareholders received for the following items on the Ballot:

With regard to the election of directors for the ensuing year, the following nominees each received the number of votes set forth opposite their respective names, to wit:

Louis V. Aronson II	2,255,525
Jerome J. Blumberg	2,255,387
Morrill J. Cole	2,255,525
A. Lester Granet	2,255,525
Gilbert MacKay	2,255,525
Morton A. Siegler	2,255,387
Justin P. Walder	2,255,525
William T. Cahill	1,810,447
James C. Malone	1,810,585
John R. Markley	1,810,585
Oreste Marfuggi	1,811,447
Philip Marfuggi	1,810,447
Charles E. McCarthy	1,810,447

Appendix III

Saul H. Weisman	1,810,447
David A. Werblin	1,810,447
Donald J. Zoeller	1,811,447

Accordingly, we now report that the following were duly elected directors of the Company for the ensuing year: Louis V. Aronson II, Jerome J. Blumberg, Morrill J. Cole, A. Lester Granet, Gilbert MacKay, Oreste Marfuggi, Morton A. Siegler, Justin P. Walder and Donald J. Zoeller.

With regard to the ratification of Auditors for the year 1974 we now report the results of the voting as follows:

FOR the ratification of Auditors for the year 1974	2,149,606
AGAINST the ratification of Auditors for the year 1974	22,818

All of the foregoing is respectfully submitted this 6th day of September 1974.

JOHN P. MEAD

LAWRENCE BLOOM

Appendix III

RONSON CORPORATION

ANNUAL MEETING OF STOCKHOLDERS JUNE 13, 1974

INSPECTORS REPORT

We, The Subscribers, The Inspectors appointed by the presiding officer at the Meeting of the Company this 13th day of June, 1974, do report that, having taken the oath impartially to conduct the voting, we did receive the votes of shareholders by proxy and by ballot, and we report that the following were the number of votes of shareholders received for the following items on the ballot:

With regard to the election of directors for the ensuing year, the following nominees each received the number of votes set forth opposite their respective names, to wit:

Louis V. Aronson II	2,255,525
Jerome J. Blumberg	2,255,387
Morrill [illegible] Cole	2,255,525
A. Lester Granet	2,255,525
Gilbert MacKay	2,255,525
Morton A. Siegler	2,255,387
Justin P. Walder	2,255,525
William T. Cahill	1,811,447
James C. Malone	1,811,585
John R. Markley	1,811,585
Oreste Marfuggi	1,811,447
Philip Marfuggi	1,811,447
Charles E. McCarthy	1,811,447
Saul H. Weisman	1,811,447
David A. Werblin	1,811,447
Donald J. Zoeller	1,811,447
FOR the ratification of Auditors for the year 1974	2,149,606
AGAINST the ratification of Auditors for the year 1974	22,818

All of which is respectfully submitted this 8th day of July 1974.

JOHN P. MEAD

LAWRENCE BLOOM